IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6372

LEON WEBSTER QUILLOIN,

Appellant,

v.

ARDELL WILLIAMS WALCOTT
and RANDALL WALCOTT,

Appellees.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

BRIEF OF THE APPELLANT

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INTRODUCTION

Appellant, Leon Webster Quilloin, entered this Appeal to the Supreme Court of the United States on March 11, 1977, and this Court noted probable jurisdiction in this case on May 31, 1977. This Appeal is taken from the highest court of the State of Georgia. It is Appellant's contention here, as in the trial court and the Supreme Court of the State of Georgia, that Appellant has been denied due process of the law and the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution by

the Statutes of the State of Georgia herein questioned. The application of said Statutes to the Appellant have unconstitutionally left Appellant without standing to object to the adoption of his biological child based merely upon his legal relationship to the mother.

OPINION BELOW

The opinion and judgment of the Supreme Court of the State of Georgia was attached as Appendix "A" to the Jurisdictional Statement and is incorporated in the single Appendix as (App. 81). Said decision is cited in the official publications for the State of Georgia as *Quilloin v. Walcott*, 238 Ga. 230 and in the unofficial report as *Quilloin v. Walcott*, 232 S.E.2d 246.

JURISDICTION

The jurisdiction of this Court is envoked pursuant to 28 U.S.C. §1257(2) on the grounds that this is an appeal from the Supreme Court for the State of Georgia pursuant to Ga. Code Ann. §2-3104 which provides that the Supreme Court for the State of Georgia has exclusive jurisdiction in matters relating to the construction of the United States Constitution and is the court of last resort in the State of Georgia for that purpose. The Supreme Court of the State of Georgia entered a final decision and denied rehearing thereon that upheld the validity of a Statute of the State of Georgia where the validity of said Statutes was questioned on the grounds that said Statutes were repugnant to the Fourteenth Amendment to the Constitution of the United States. The initial decision of the Supreme Court of the State of Georgia was entered on January 6, 1977 (App. 81). Appellant's Motion for Rehearing was denied on January 27, 1977 (App. 88). On February 18, 1977, Appellant filed his Notice of Appeal with the Clerk of

the Supreme Court of the State of Georgia to appeal said decision to the Supreme Court of the United States (App. 95). Therefore, the filing of the Notice of Appeal in the Georgia Supreme Court, which was the court possessed of the record, within ninety (90) days after the entry of said judgment, was timely to envoke the jurisdiction of this Court pursuant to Rule 11 of this Court.

The Appellant entered his appearance and filed his Jurisdictional Statement in this Court on March 11, 1977. Therefore, the docketing of this case was timely to envoke this Court's jurisdiction pursuant to Rule 13 of this Court.

Counsel for all parties conferred as to the contents of the single Appendix pursuant to Rule 36(2) and agreed to its contents. Counsel for the Appellant has filed the single Appendix on or before July 15, 1977, which is within forty-five (45) days of the Order of this Court dated May 31, 1977, noting probable jurisdiction. Therefore, the filing of the single Appendix pursuant to Rule 36 of this Court is timely to envoke this Court's jurisdiction.

Counsel for the Appellant has filed this Brief on the Merits within forty-five (45) days of May 31, 1977, when this Court noted probable jurisdiction in this case, therefore complying with this Court's Rule 41 to envoke the jurisdiction of this Court.

STATUTES INVOLVED

The text of the relevant States involved is as follows: Georgia Laws, 1943, page 538, as amended, Ga. Code Ann. §74-203, Georgia Code (3028):

> "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him as before provided. Being the only recognized parent, she may exercise all the paternal power."

Georgia Laws, 1941, page 300, as amended, Ga. Code Ann. §74-403:

"(1) Except as otherwise specified in the following subsections, no adoption shall be permitted except with the written consent of the living parents of a child. Said consent, when given freely, voluntarily, may not be revoked by the parents as a matter of right. In the case of a child 14 years of age, or over, the consent of such child also shall be required, and must be given in writing in the presence of the court."

"(2) Exemption where child abandoned or parental custody terminated.–Consent of a parent shall not be required where a child has been abandoned by such parent, or where such parent of a child cannot be found after a diligent search has been made, or where such parent is insane or otherwise incapacitated from giving such consent and the court is of the opinion that the adoption is for the best interest of the child, or where such parent has surrendered all of his or her rights to said child to a licensed child-placing agency, or to a court of competent jurisdiction for adoption, or to the Department of Human Resources through its designated agents, or where such a parent has had his or her parental rights terminated by order of a juvenile or other court of competent jurisdiction, or where such parent is dead. Where a decree has been entered by a superior court of this State or any other court of competent jurisdiction of any other State ordering a parent to support a child and such parent has wantonly and willfully failed to comply with the order for a period of 12 months or longer, the consent of such parent shall not be required and the consent of the other parent alone shall suffice in any proceedings for adoption relative to such child."

"(3) Illegitimate children.–If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the Department of Human Resources."

"(4) Guardian.–If the child has a guardian of its person, the consent of such guardian shall be required, or if the child has been surrendered or committed by court order

to a licensed child-placing agency, the consent of such agency shall be required."

"(5) Minor parents.–The parental consent when required by this section, may be given by the natural parents or parent of the child sought to be adopted irrespective of whether such natural parent, or either, or both of them, have arrived at the age of 21 years. The parental consent given by the minor natural parents shall be as binding upon them as if such parents were in all respects sui juris."

Only Section (3) of Ga. Code Ann. §74-403 is in issue.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED BY THIS APPEAL

Do the provisions of Georgia Laws, 1943, page 538, as amended, Ga. Code Ann. §74-203, Georgia Code (3028), and Georgia Laws, 1941, page 300, as amended, Ga. Code Ann. §74-403(3) violate the due process and the equal protection rights of the Appellant guaranteed to the Appellant by the Fourteenth Amendment to the United States Constitution by creating a presumption and classification that distinguishes and burdens all unwed fathers based upon the legal rather than the factual concept of fathers, thereby presuming all

unwed fathers are unfit to have total or partial custody of their minor children without regard to the expression of tangible interest in said child by the biological father, thereby denying all unwed or illegal fathers standing to object to the adoption of their minor biological children while said basic adoption statutes of the State of Georgia give legal (married, divorced, adoptive) fathers the absolute right of veto over any adoption of their minor children so long as they have not abandoned the child?

STATEMENT OF CASE

This action commenced with the birth of Darrell W. Quilloin on the 25th day of December, 1964 (App. 44) [T-43]. Appellant paid the medical bills consequent upon this birth (App. 44) [T-44] and subsequent medical bills for said child because of the child's ongoing illness (App. 51) [T-54]. The legal actions concerning this child commenced with the filing of the original Petition for Adoption wherein the step-father, Randall Walcott, filed his Petition to adopt the minor child, Darrell W. Quilloin, now aged 12. (App. 3). The step-father was married to the Appellee, Ardell Williams Walcott on September 16, 1967 (App. 20) [T-3]. In 1969, Darrell Quilloin came to live with his natural mother and step-father (App. 22) [T-7]. On March 23, 1976, the natural mother, Ardell Walcott, gave her consent to the adoption of her minor child, Darrell W. Quilloin, by her present husband (App. 5). Darrell W. Quilloin was the admitted biological child of Appellee Ardell Williams Walcott and Appellant Leon Webster Quilloin (App. 3). The Appellant was admitted to be the biological father of said child, but was never served with said Petition for Adoption (App. 59) [T-67], but was notified of the filing of said adoption action by the caseworker for the Department of Human Resources (App. 57) [T-65].

The Appellant filed an objection to said adoption as the natural parent of Darrell W. Quilloin (App. 8). Appellant also

filed a Writ of Habeas Corpus in an effort to establish visitation rights to said minor child (App. 10). Appellant also filed a Petition to Legitimate said minor child pursuant to Ga. Code Ann. §74-103 (App. 12). By consent of counsel, all actions were consolidated for trial. Appellant also filed an Amendment to said consolidated action raising the issue of the constitutionality of the application of Georgia Code (3028), Georgia Code of 1933, as amended, Georgia Laws, 1943, page 538, as amended, Ga. Code Ann. §74-203, to the Appellant in this case (App. 14). Appellant also filed a second amendment raising the issue of the constitutionality of the application of Ga. Code Ann. §74-403(3), Georgia Laws, 1941, page 301, as amended (App. 16). The above-styled action was tried on June 23, 1976, before The Honorable Elmo Holt, Judge of the Superior Court of Fulton County, State of Georgia, and the trial court took said case under advisement and on July 12, 1976, entered an Order wherein the trial court cited under Conclusions of Law: (App. 70)

1.

"The child in question, being illegitimate, the consent of the mother alone to the adoption is sufficient." (Georgia Laws, 1941, as amended, Ga. Code Ann. §74-403(3).

2.

"The biological father, Leon Webster Quilloin, has no standing to object to the proposed adoption, the mother having the right to possession of the child and she being the only recognized parent with the right to exercise all the parental power." Ga. Code Ann. §74-203, (App. 72).

Section five of said Order was amended by a subsequent Order on the 21st day of July, 1976, which did not in any manner change the conclusions of law or findings of fact contained in the Order of July 12, 1976 (App. 74). Therefore, the trial court applied said Statutes, which are herein constitutionally questioned, to the Appellant.

The Appellant appealed from said trial court's ruling to the Georgia Supreme Court (App. 75), and filed his Enumeration of Errors committed by the trial court (App. 79).

On January 6, 1977, the majority of the Justices of the Supreme Court of the State of Georgia affirmed the ruling of the trial court (App. 81). By way of explanation of Appendix "A" to the Jurisdictional Statement, Chief Justice Nichols' name is typed among the Justices who dissented; however, from hearsay information derived from the Clerks of the Georgia Supreme Court, Chief Justice Nichols, before the publication of the official decision, struck his name from the dissent and thereby joined the majority that affirmed the ruling of the trial court. Appellant filed a Motion for Rehearing which was denied on January 27, 1977 (App. 88). On rehearing, Justice Ingram joined Justices Undercofler and Gunter in the dissenting opinion. See Appendix "V" to the Jurisdictional Statement (rehearing card). The final result was therefore a four to three vote against the Appellant.

The statutory provisions of the State of Georgia herein questioned were constitutionally questioned in the State Trial Court and the highest Appellate Court for the State of Georgia, reviewed and passed upon adversely to the Appellant, and, therefore, the nature of this case clearly comes under the statutory framework of 28 U.S.C. 1257(2).

SUMMARY OF ARGUMENT

BOTH GA. CODE ANN. §74-203, GEORGIA CODE (3028), AND GEORGIA CODE ANN. §74-403(3), GEORGIA LAWS, 1941, PAGE 300, AS AMENDED, ARE REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THEIR APPLICATION TO THE APPELLANT UNWED FATHER IN THAT THEY CREATE INVIDIOUS DISCRIMINATION BASED SOLELY UPON HIS MARITAL STATUS TO THE BIOLOGICAL MOTHER WITH NO COMPELLING STATE INTEREST JUSTIFICATION.

Ga. Code Ann. §74-403(1) provides in part that:

> "(1) Except as otherwise specified in the following subsections, no adoption shall be permitted except with the written consent of the living parents of a child."

The Appellant was entitled to the same statutory right of veto over the adoption of his minor child given other parents under Georgia Law for the reason that the challenged Statutes are repugnant to the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution.

It is the contention of the Appellant that all possible arguments for the validity of the challenged Statutes have been eliminated by this Court's ruling in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 551 (1971) which held that a presumption which distinguishes and burdens all unwed fathers was repugnant to the equal protection clause of the Fourteenth Amendment when said presumption extended the right of hearing on a parent's fitness to legal parents, but denied it to unwed fathers. This Court rejected the idea that the State may extend equal protection based upon a legal relationship as opposed to biological relationships.[1] This

[1] To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the equal protection clause necessarily limits the authority of a State to draw such "legal" lines as it chooses. *Glona v. American Guaranty and Liability Insurance Company*, 391 U.S. 73, 75-76, 88 S.Ct. 1515, 1516, 20 L.Ed.2d 431 (1968), *Stanley* at page 1213 S.Ct.

Court has held that *Stanley's* due process rights stemmed from the biological fact of paternity. This was made clear by the footnote of this Court's decision in *Stanley* which stated:

> "If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearing." *Stanley, supra*, at page 1216 S.Ct. Footnote 9.

It is clearly the public policy of the State of Georgia to afford putative fathers the right to legitimate their children after the filing of an adoption action and thereafter to be afforded the same veto rights as a natural parent.[2]

[2] Georgia Laws, 1977, page 201 (page 13 of Appendix "A" to the Brief of the State of Georgia in support of Appellees Motion to Dismiss.)

"(b) If the identity and location or either of the putative father of an illegitimate or legitimate child is not known or reasonably ascertainable then upon motion by either the petitioner(s), Department of Human Resources, or licensed child-placing agency, the court, as soon as practicable, shall make such inquiry as it deems appropriate under the circumstances and shall determine whether the identity and location of the putative father is ascertainable, and whether the putative father lived with the child, contributed to its support, or has given any other tangible indication of interest in the child, so as to entitle him to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceedings to terminate. If the court identifies the putative father and determines that he is entitled to notice of the mother's surrender or the proceeding to terminate her parental rights it shall enter an appropriate order designed to afford him such notice. If after inquiry the court is unable to identify the putative father or concludes that he is not entitled to notice of the mother's surrender or her consent to the child's adoption by her husband, or the proceedings to terminate her parental rights, the court shall enter an order terminating the putative father's rights with reference to the child.

(c) When notice is to be given pursuant to subsection (a) or (b) above, it shall advise the putative father that he loses all rights to the child and will neither receive notice nor be entitled to object to the adoption of the child unless he files (1) a petition to legitimate the child pursuant to Code Section 74-103, and (2) notice of such petition to legitimate with the court in which the adoption is pending, within thirty (30) days of receipt of such notice.

(continued)

The Georgia Supreme Court held in *Smith v. Smith*, 224 Ga. 442 (1968), 162 S.E.2d 379, that the father's action of filing a legitimation petition pursuant to Ga. Code Ann. §74-103 after the filing of an adoption action containing the mother's consent was time barred. The Georgia Supreme Court also held in *Hicks, et al. v. Smith, et al.*, 94 Ga. 809 (22 S.E. 153) that:

> "A bastard who has been legitimated by Order of the Superior Court under the provisions of Section 1787 of the Code, by force of that provision of the law may take by dissent from his father only."

Therefore, a Superior Court legitimation of the minor child in this case would only have given that child the right to inherit from the father only, and not for his children to inherit through him from his father, and would also have changed the minor child's name.

However, the Appellant at birth having acknowledged the child in writing, the child had always been known as Darrell Webster Quilloin.

Ga. Code Ann. §88-1709(2) provides:

"If the mother of a child is not married to the natural father at the time of birth, the name of the putative father shall not be entered on the Certificate of Birth without the written consent of the person to be named as father unless a final determination of paternity has been made by the Court having jurisdiction, in which

(footnote continued from preceding page)

(d) If a legitimation petition is not filed by the putative father and notice given as required in subsection (c) within thirty (30) days of his receipt of notice, as provided for in subsection (a) or (b) above, or if after filing such petition, he fails to prosecute it to final judgment he loses all rights to the child and he may not thereafter object to the adoption and is not entitled to receive notice of the adoption.

(e) If the child is legitimated by the putative father, the adoption shall not be permitted except as provided in Code Sections 74-403 through 405."

case the name of the father as determined by the Court shall be entered. Where there is no consent of the putative father, the surname of the child shall be the legal surname of the mother."

Therefore, the Superior Court legitimation procedure, pursuant to Ga. Code Ann. §74-103, in this particular case would have been completely moot in view of this Court's decision in *Trimble v. Gordon*, ____ U.S. ____, 97 S.Ct. 1459, 52 L.Ed. 31 (decided April 26, 1977). In *Trimble, supra*, this Court held that a Statute of the State of Illinois which allowed children born out of wedlock to inherit by intestate succession only from their mother was constitutionally prohibited since the Statute provided that children born in wedlock could inherit by intestate succession from both their mothers and their fathers. Paternity in this case was never an issue due to the fact that the child has always been the recognized child of the Appellant, by the Appellant (App. 44) [T-43], and the biological mother (App. 23) [T-8, 9]. Therefore, the present posture of Georgia Law is that an unwed father is denied standing to object to the adoption of his minor child by his failure to utilize useless, inferior legal procedure, i.e., *Trimble, supra* allows inheritance through the father not merely from the father.

There is no longer any compelling State interest for the existence of the challenged Statutes since the public policy of the State of Georiga, as shown by the Acts of its legislators, clearly intends to give unwed fathers legal parent standing upon a showing of tangible interest. See Appendix "A" to the Brief of the State of Georgia in support of Appellees Motion to Dismiss, page 14, Georgia Laws, 1977, page 201.

Under this Court's mandate in *Stanley, supra*, and the application of this Court's criterion of "strict scrutiny with teeth" as applied in *Trimble, supra*, the Appellant had standing to object to the adoption of his minor child and was not time barred from doing so and, absent a showing of unfitness, should have been given at least minimal custody in the form of visitation privileges with said child.

ARGUMENT

I.

BOTH GA. CODE ANN. §74-203, GEORGIA CODE (3028), AND GEORGIA CODE ANN. §74-403(3), GEORGIA LAWS, 1941, PAGE 300, AS AMENDED, ARE REPUGNANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THEIR APPLICATION TO THE APPELLANT UNWED FATHER IN THAT THEY CREATE INVIDIOUS DISCRIMINATION BASED SOLELY UPON HIS MARITAL STATUS TO THE BIOLOGICAL MOTHER WITH NO COMPELLING STATE INTEREST JUSTIFICATION.

This Court has held in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 551 (1971) that a presumption that distinguishes and burdens all unwed fathers was repugnant to the equal protection clause of the Fourteenth Amendment when said presumption extended the right of hearing on a parents fitness to legal parents but denied it to unwed fathers. The adoption laws for the State of Georgia will become consistent with this Court's mandate in *Stanley, supra* effective January 1, 1978. The public policy of the State of Georgia, as shown by the acts of its legislators, clearly intends to give unwed fathers legal parent standing upon a showing of tangible interest. (See Footnote 1 (e)). The challenged present Statutes that were applied to the Appellant in this case are constitutionally void by reason of the creation of a classification that equals invidious discrimination being applied to the Appellant merely because he failed to marry the mother of his biological child. It should be noted here that there is nothing in the record to indicate that the biological mother would have married the Appellant. The new Statute gives to the father of an illegitimate child the procedural and substantive rights dictated by *Stanley, supra* and by *Glona v. American Guaranty and Liability Insurance Company*, 391

U.S. 73, 75-76, 88 S.Ct. 1515, 20 L.Ed.2d 431 (1968) which held:

> "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the equal protection clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses."

Appellees may argue that the public policy of the State of Georgia, as shown by the acts of its legislature, has not changed during the pendency of this litigation since the new adoption act is not to be effective until January 1, 1978. However, said act repealed Georgia's entire adoption laws, which, of course, included the challenged Statutes, and this specific repealer was passed January 17, 1977, by the Senate, February 8, 1977, by the House, and approved by the Governor on February 25, 1977. (See Appendix "A" to the State of Georgia's Brief in support of Appellee's Motion to Dismiss.) The peers of the Appellant and Appellees elected the Georgia Legislature, who should be responsive to their will, and it should not be assumed that the mere postponement of the effective date of the Act indicated that our present legislators thought that the new Act would be good law on its effective date, but bad law at this time. The only rational assumption for the reason why the effective date of the Act was postponed would be the fact that the Act does comprehensively revise the old adoption Statute and change the procedure relating thereto and, therefore, it was necessary for the Department of Human Resources, adoption agencies, lawyers, and judges to study the Act so that they could procedurally respond.

A rational assumption should be that the legislature for the State of Georgia was of the opinion that the public policy of the State of Georgia would be served by giving putative fathers the right to legitimate their children *after the filing of an adoption* and thereafter be benefited by the preferential position of a legal parent in any custody proceeding affecting their minor children. The Georgia legislature clearly looked to

this Court's interpretation of the due process and equal protection clause in *Stanley, supra* in drafting Georgia Laws, 1977, page 201. The constitutional rationale of *Stanley* was clearly promulgated into the new adoption statute. If this case is not decided by this Court, adversely to the Appellant, prior to January 1, 1978, it is the opinion of counsel for the Appellant that the expression of the public policy of this State, as set forth in the new adoption act, will have to be applied for the benefit of the Appellant. The weight of authority in Georgia is to the effect that a reviewing court should apply the law as it exists at the time of its judgment rather than the law prevailing at the rendition of the judgment under review, and may therefore reverse a judgment that was correct at the time it was rendered and affirm a judgment that was erroneous at the time where the law has been changed in the meantime and where such application of the law will impair no vested right under the prior law. *Western Union Telegraph Company v. Smith*, 96 Ga. 569 (23 S.E. 899); *City of Valdosta, et al. v. Singleton, et al.*, 197 Ga. 194, 208 (38 S.E.2d 759). Under the authority of Ga. Code Ann. §6-1002(a), filing of the Notice of Appeal was supersedeas. The Order of the trial court approving the adoption is not yet effective. Randall Walcott, the step-parent of Darrell Quilloin, has no vested rights in Darrell Quilloin at this time and cannot be legally harmed.

Ga. Code Ann. §6-1002(a):

> "In civil cases, the notice of appeal filed as hereinbefore provided, shall serve as supersedeas. . . ."

However, Appellant would urge this Court to strike down said Statutes as they were applied to the Appellant in that Appellant cannot be totally sure of the actions of the Supreme Court of the State of Georgia on remittitur in view of the fact that the new adoption statute does not give initial preferential rights to the biological father. (See Footnote 2(b)).

There was never any contention by any of the parties to this case that the minor child was a deprived or delinquent

child. On the contrary, everyone has agreed that Darrell Quilloin has been generally well cared for and not abandoned. (App. 32) [T-24]. Therefore, the jurisdiction of the Georgia Juvenile Courts could never be applied to Darrell since Darrell was never a delinquent, unruly, or deprived child.[3]

Therefore, the Juvenile Code cannot be applied to this case. However, as an illustration of this State's public policy, though it fails to go far enough by affording unwed fathers preferential substantive rights,[4] the fairly new Juvenile Court Statute for the State of Georgia does allow the putative father

[3]Ga. Code Ann. §24A-301, Jurisdiction over juveniles.

(a) The court shall have exclusive original jurisdiction over juvenile matters and shall be the sole court for initiating action:
(1) Concerning any child;
(A) who is alleged to be delinquent except when the allegation is based on a delinquent act which would be considered a crime if tried in a superior court and for which the child may be punished by loss of life or confinement for life in the penitentiary;
(B) who is alleged to be unruly;
(C) who is alleged to be deprived;
(D) who is alleged to be in need of treatment or commitment as a mentally ill or mentally retarded child;
(E) or who is alleged to have committed a juvenile traffic offense in section 24A-3101.

[4]Ga. Code Ann. §24A-3202, Proceeding for termination of parental rights.

(b) If the paternity of a child born out of wedlock has been established in a judicial proceeding to which the father was a party prior to the filing of the petition the father shall be served with summons as provided by this Code [Title 24A]. He has the right to be heard unless he has relinquished all paternal rights with reference to the child. The putative father of the child whose paternity has not been so established, upon proof of his paternity of the child, may appear in the proceedings and be heard. In either event nothing in this section shall be construed to preclude the father's petitioning for custody of the child. At the time of said hearing, upon proof of paternity being shown to the court, the father shall be allowed to petition for custody of the child and the court shall grant same, if such shall be in the best interest of the child. He is not entitled to notice of hearing on the petition unless he has custody of the child. (Acts 1971, pp. 709, 747.)

to petition for custody of the child. However, this Statute is also inconsistent with the basic rights afforded legal parents[5] in that legal parents must be shown to be unfit before their children can be awarded to a third party.

It cannot be refuted that divorce is prevalent in our society. It has been reported from some sources that there are now approximately 49 divorces for every 100 new marriages. Children are the product of many of these abortive relationships. No one argues that the fathers of these children should be denied the parent-child relationship. Georgia, like many other States, no longer condemns divorce, but has passed a no-fault divorce law.[6] The Appellant in this case should be considered a de facto divorced father in that he stands in basically the same relationship to the child as a divorced father who has been given visitation rights with the child. In this case the Appellant was allowed to have visitation with the child and have the child visit with him in the past (App. 46) [T-46]. If the mother had so desired, she could have filed a support petition in the Superior Court which

[5]*Patman v. Patman*, 231 Ga. 657, 203 S.E.2d 486,

[1] Under the law of this State, there are basically two ways by which custody of a minor child may be taken from his natural parent or parents. The first is pursuant to Code, §74-108 which lists six different ways a natural parent may forfeit his or her right to the custody of his or her child. The approved stipulation in the record in this case does not substantiate forfeiture under Code, §74-108.

A Second way of depriving a natural parent of the custody of his child is upon a clear and satisfactory showing that the parent is an unfit person to have such custody. See *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388. The approved stipulation in the record in this case does not show that the natural mother is an unfit person to have custody of her child.

[2] Having reviewed this record, we do not find any evidence that would warrant the judgment by the trial judge awarding permanent custody of this minor child to a third party.

Judgment reversed.

[6]Ga. Code Ann. §30-102(13), The marriage is irretrievably broken.

would have given her exactly the same benefits that are afforded as ancillary relief in divorce cases.[7] The Appellee, biological mother, did not desire this support, but only desired to be rid of the Appellant which is a fairly common desire of ex-wives who have remarried. The only reason truly given in the transcript of this case as to why the Appellees wanted to be rid of the Appellant was because it disrupted their family life with their present family, and that the giving of gifts to Darrell by the Appellant created an over balance of gifts that were detrimental to the seven-year-old child born to the biological mother and the step-parent, Appellee (App. 35) [T-28, 29]. The minor child testified that he recognized Mrs. Mable Dawson, the mother of the Appellant, as his grandmother (App. 68) [T-82], and the Appellant as his real father (App. 67) [T-81]. The minor child testified both that he did not oppose the adoption and that he remembered being with the Appellant, and if it was left to him, that he would like to see the Appellant sometimes (App. 68) [T-82].

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[7] *Simmons v. Chambliss*, 128 Ga. App. 218 (196 S.E.2d 183):

> [1] The defendant's motion to dismiss the petition for failure to "state a cause of action," is without merit. The petition alleged the petitioner's maternity, the defendant's paternity, the children's minority, the defendant's continuous failure to provide adequate support for said children and sought a court order for temporary and permanent support. This is sufficient.
>
> [2, 3] The defendant did not elect to include a transcript of record for his appeal. Hence, we are bound to assume that the trial judge's findings are supported by competent evidence. This being the case, the only issue presented is the legal sufficiency of the trial court's judgment. "The father of an illegitimate child shall be bound to maintain him until said child reaches the age of 18, marries or becomes self-supporting, whichever occurs first." Code Ann. §74-202 (Ga.L. 1972, pp. 494, 495). Upon a determination of the defendant's paternity of the children, this law requires that this duty be performed.
>
> The court order the defendant to pay child support bi-monthly "until said children arrive at the age of eighteen years, marry, die or become self-supporting, whichever shall occur first."
>
> Judgment affirmed.

The Appellant testified at length in his direct testimony from (App. 44) [T-44] to (App. 53) [T-57] how he had loved and cared for the child, including the procurement of food, clothing and medical care for said child, and sending child to kindergarten and actually taking him most of the time. In what manner does this factual situation differ from the many cases of short-lived marriages and divorce? It is the contention of the Appellant that a Statute may not be drawn to define a father as legal rather than biological. The equal protection clause necessarily limits the authority of a State to draw such "legal lines" as it chooses. *Glona v. American Guaranty and Liability Insurance Company, supra.*

The interest of the Appellant in this case is particularly important in view of the fact that the minor child in question may decide, upon reaching age 14, that he wishes to live with the Appellant. If this should occur, then it will be mandatory upon the trial court to change the custody of said child to Appellant absent a showing that the Appellant is not a fit and proper person to have the custody of said child.[8] There is

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[8] Ga. Code Ann. §74-107, Custody of minor children, discretion of court as to:

> In all cases where the custody of any minor child or children is involved between the parents, there shall be no prima facie right to the custody of such child or children in the father, but the court hearing such issue of custody may in exercise of its sound discretion, taking into consideration all the circumstances of the case, including the improvement of the health of the party seeking a change in custody provision, as to whose custody such child or children shall be awarded, the duty of the court being in all such cases in exercising such discretion to look to and determine solely what is for the best interest of the child or children, and what will best promote their welfare and happiness, and make award accordingly. In all such cases and in cases where a change in custody is sought, where the child has reached the age of fourteen years, such child shall have the right to select the parent with whom such child desires to live and such selection shall be controlling unless the parent so selected is determined not to be a fit and proper person to have the custody of said child.
>
> This rule applies even if both parents qualify to have the child.
> *Peacock v. Adams*, 230 Ga. 774 (199 S.E.2d 254).

absolutely no evidence in this record to indicate that the Appellant would be unfit to have partial custody or full live-in custody in the event that upon the child reaching the age of 14 he elects the Appellant as his custodian.

The Appellant should not be mistaken to be questioning the fitness of the Appellees. This is not done. The Appellant admitted during the trial court hearing that he felt that the minor child should be with the mother the major portion of the child's time (App. 57) [T-64]. How does this differ greatly from the position of the majority of divorced fathers who feel that the mother is the better parent between the parents to have the custody of children of tender years, but nevertheless, said fathers desire the society of their children by visitation rights? There is no rationale compelling State interest or public policy that would authorize the treatment of an unwed father differently from a divorced father. After all, are they not both unwed fathers insofar as it relates to their matrimonial status with the biological mother?

The Appellees and the State of Georgia may argue that the decision by this Court to treat unwed fathers with the same legal dignity of legal or divorced fathers will cause impediments in the placing of born and unborn children for adoption. This impediment should be no greater, however, than the impediment that is created when the parties marry, live together a short while and immediately separate after the conception of a child. Therefore, the pre- or post-birth status of the child should be indistinguishable insofar as it relates to the father's legal rights.

Appellees and the State of Georgia may argue that the service upon putative fathers to terminate their parental rights will create major impediments in the adoptive placement of minor children. However, it has been previously shown herein that Ga. Code Ann. §24A-3202 provides that if the paternity of a child born out of wedlock has been established in a judicial proceeding to which the father was a party prior to the filing of the petition, the father must be served with summons in the case. In construing Ga. Code Ann.

§24A-3204(a), the Georgia Court of Appeals held that constructive notice, i.e., service by publication as provided under Ga. Code Ann. §24A-1702(b) was sufficient to bestow jurisdiction over the putative fathers in each case under the authority of *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, *In the interest of J. B., In the interest of A.D.S.*, 140 Ga. App. 668, 231 S.E.2d 821, decided (November 19, 1976.)

In this particular case the only service received by the Appellant was quasi constructive notice by a phone call from the Department of Human Resources (App. 58). [T-66]. This service was sufficient for the Appellant in this case to file his objections. The Appellant does, however, take violent exception to any argument that he has been afforded a due process hearing which would be a legal and factual absurdity in this case since the trial court found as a matter of law that he had no standing in this case (App. 72).

A. Post Stanley Decisions By This Court Clearly Indicate That The Stanley Custody Rationale Must Be Applied To The Adoption Setting.

The Appellees may argue that this Court did not intend to give substantive custody rights by its ruling in *Stanley, supra.* This argument is quickly refuted by this Court's ruling in *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (April 17, 1972), and *Vanderlaan v. Vanderlaan*, 405 U.S. 1051 (April 17, 1972). In *Vanderlaan, supra* the Appellate Court of Illinois in *Vanderlaan v. Vanderlaan*, 126 Ill. App.2d 410 (262 N.E.2d 717) reversed a trial court's award of custody to the father of the subject children on the grounds that the children were born out of wedlock.[9] This Court summarily reversed and held the

[9] Section 13 clearly embodies a legislative determination that a putative father should have no right to the society of his illegitimate child. *Wallace v. Wallace*, 60 Ill. App.2d 300, (210 N.E.2d 4). A contrary construction of the Statute cannot be justified. Plaintiff's

(continued)

Stanley rationale must be applied. *Vanderlaan, supra* was not an adoption case, but a case involving actual custody of minor children by a putative father.

The Oregon Adoption Statute, O.R.S. 109.326(1) which is substantially identical to Georgia's Adoption Statute, permitted the adoption of a child born out of wedlock upon the consent of the natural mother, without notice to, or the consent of, the natural father. In *Miller v. Miller*, 504 F.2d 1067 (1974), the United States Court of Appeals for the 9th Circuit declared that the application of the Statute would infringe upon the Federal Constitutional rights of the Appellant and all natural fathers similarly situated. The Solicitor General of the State of Oregon in oral argument in *Miller, supra* conceded, in effect, that the State Statute in question was out of harmony with the Federal Constitution. A similar concession in this case by the Attorney General for the State of Georgia would be warmly received by the Appellant.

The Congress of the United States, in looking to the best interest of minor children, has accepted acknowledgment of a minor child as criterion for the receipt by said minor child of Social Security Benefits from biological fathers' accounts and amended the Social Security Act by the terms of Section 216(h)(2) to allow a recognized child to draw from the account of his biological father.[10]

(footnote continued from preceding page)

Complaint in this case prayed that he be granted custody or visitation rights as to Donna. By Statute, he was not permitted to have either. Consequently, the Complaint should have been dismissed for want of equity in the trial court on Defendant's Motion.

We must abide by the legislative determination that a putative father should have no rights to the society of his children born out of wedlock. (***DePhillips v. DePhillips, supra.***)

. . . Section 13 of the Bastardy Act, as amended, prohibits not only the granting of custody, but also the granting of "control" to a putative father (and thereby prohibits visitation rights to a parent). (Emphasis supplied.)

[10] Section 216(h)(2) of the Social Security Act . . . (1) have acknowledged in writing that the Applicant is his son or daughter."

This Court was called upon to construe a section of the Social Security Act in light of due process and equal protection in *Califano v. Goldfarb*, ____ U.S. ____, 97 S.Ct. 1021 (1977), 51 L.Ed. 270 decided March 2, 1977. This Court in *Califano, supra* held that gender-based distinctions under the Social Security Act are repugnant to the Federal Constitution. The challenged Georgia Statutes are also gender-based distinctions and for the reasons stated in *Califano, supra* are out of touch with the equal protection clause of the Fourteenth Amendment.

CONCLUSION

The Appellant in this case clearly passes the tangible interest criterion of the new Georgia Adoption Statute and does not deserve to be punished by the misconduct of other unwed fathers.

For the foregoing reasons, the decision of the Supreme Court of Georgia should be reversed and the criterion of *Stanley* and *Vanderlaan* applied for the benefit of the Appellant.

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